In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-1495

FLORENCE G. SHEFNER, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner brought this action under Section 205(g) of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. 405(g), to review a final decision of the Secretary upholding a deduction in wife's and retirement insurance benefits in the amount of $178.30. Petitioner has worked since 1956 as a secretary for her husband, who is a self-employed attorney and certified public accountant. Petitioner applied for wife's and retirement insurance benefits in 1972. In a revised determination, the Secretary ruled that petitioner was eligible for such benefits but that benefits could not be paid to her because she had excess earnings from her employment with her husband for the taxable years 1968 through 1971. Because of these excess earnings,

a refund was demanded of $178.30 in benefits that had been paid to petitioner by mistake in May 1969 and September 1970.[1]

Before the hearing examiner, petitioner urged that because services performed in the employ of a spouse are excluded from the definition of "employment" in Section 210(a)(3)(A) of the Act, and therefore are not subject to Federal Insurance Contributions Act taxes, remuneration for such services should not constitute excess earnings for purposes of deductions from benefits (Pet. Add. 5). In rejecting this argument, the hearing examiner noted that "the Congressional definition of excess earnings for purposes of benefit deductions expressly includes, under section 203(f)(5)(C), remuneration for services which do not constitute 'employment' as defined in section 210 if such services are performed within the United States as a employee and such remuneration is not includable in computing self-employment net earnings or loss" (Pet. Add. 6). The hearing examiner specifically found that petitioner's earnings "were remuneration for services performed within the United States as an employee and were not net earnings from self-employment" (Pet. Add. 8). The hearing examiner's decision became the final decision of the Secretary when the Appeals Council denied further review (Pet. Add. 10). Petitioner then filed this action in the United States

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[1]The Secretary's authority to make deductions against Social Security benefits is provided in Section 203(b) of the Act. Deductions are allowed "on the basis of such individual's wages and self-employment * * * if * * * he is charged with excess earnings * * *." "Excess earnings" is defined in Section 203(f)(3) as "earnings * * * in excess of the product of $175 * * * multiplied by the number of months in such year."

District Court for the District of Minnesota. The district court granted summary judgment for the Secretary (Pet. Add. 11-13), and the court of appeals affirmed *per curiam* (Pet. App. 1-2).

The decision below is correct, and there is no occasion for further review. Petitioner's contentions were fully answered by the district court, on whose opinion we rely.

As the district court pointed out, the issue raised by petitioner is resolved by the unambiguous language of Section 203(f)(5)(C) of the Social Security Act,[2] which provides that for the purposes of the subsection dealing with reductions of benefits, an individual's wages shall be deemed to be on account of employment even if those wages were paid for services that do not constitute employment for Federal Insurance Contributions Act tax purposes under Section 210(a)(3)(A) of the Act. See *Gardner* v. *Travis*, 387 F.2d 508 (C.A. 10).[3] Thus a person

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[2]For this reason, the tax cases cited by petitioner (Pet. 3-5) are inapposite.

[3]In *Travis*, the court held (387 F. 2d at 513):

> Section 203(f)(5)(C) expressly makes the dictates of Section 210 inapplicable to the determination of benefits deductions. That section provides that in computing an individual's wages for the purpose of making benefit deductions, 'services which do not constitute employment as defined in section [210] of this title, performed *within the United States* by the individual as an employee * * *, shall be deemed to be employment as so defined if the remuneration for such services is not includible in computing his net earnings or net loss from self-employment.' (Emphasis added). In our words, even if a service does not fall within the Section 210(a)

is ineligible to receive social security retirement benefits if that person is still working for wages and earning the statutory maximum in earnings even if those earnings are not from covered employment. The obvious purpose of Section 203(f)(5)(C) is to exclude from benefits those persons "who have [not] ceased to labor". *Social Security Board* v. *Nierotko*, 327 U.S. 358, 364.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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definition of 'employment', Section 203(f)(5)(C) requires that wages received from the performance of that service be considered in determining whether benefit deductions are warranted.